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No. 91-1848

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1992

BENJAMIN BARRY KRAMER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the district court properly departed upward from the applicable Sentencing Guidelines range.

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OPINION BELOW

The opinion of the court of appeals, Pet. App. A1-A23, is reported at 943 F.2d 1543.

JURISDICTION

The judgment of the court of appeals was entered on October 11, 1991. A petition for rehearing was denied on January 2, 1992. Justice Kennedy extended the time for filing a petition for a writ of certiorari to April 30, 1992, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioner pleaded guilty in the United States District Court for the Southern District of Florida to

one count of conspiracy to escape from the custody of the Attorney General, in violation of 18 U.S.C. 371; one count of attempting to escape, in violation of 18 U.S.C. 751(a); and one count of obtaining a prohibited object, a helicopter, to facilitate his escape, in violation of 18 U.S.C. 1791(a). He was sentenced to a total of 125 months' imprisonment, to be served consecutively to the sentences on other federal convictions. He was also sentenced to concurrent three-year terms of supervised release on each count and ordered to pay a $100,000 fine.

1. This case involves an elaborate conspiracy to effect petitioner's escape by helicopter from the Metropolitan Correctional Center (MCC) in Miami, Florida, on April 17, 1989. Pet. App. A8. At the time of the attempted escape, petitioner was serving a life sentence without eligibility for parole on federal drug charges. Those charges arose from petitioner's role as the head of a marijuana smuggling operation that brought at least 500,000 pounds of marijuana into the United States between 1982 and 1986.[1] At the time of the attempted escape, petitioner was awaiting trial in the Southern District of Florida on additional drug, racketeering, and tax charges. Pet. App. A6-A7.[2]

The planning for petitioner's escape from the Miami MCC began while petitioner was incarcerated

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[1] The presentence report (PSR) mistakenly states that the operation smuggled 60,000 pounds of marijuana. PSR 15. See *United States* v. *Kramer*, 955 F.2d 479 (7th Cir. 1992). Petitioner was also the subject of a $60 million forfeiture order filed on October 13, 1988. PSR 19-20.

[2] Petitioner was subsequently convicted on those charges and sentenced to 40 years' imprisonment. See PSR 17; Pet. App. A7 n.4. He was also sentenced in a separate case to five years' imprisonment for being a felon in possession of a firearm. Pet. App. A7 n.4.

in the Williamson County Jail in Marion, Illinois, awaiting trial on drug charges. The plan was that petitioner's co-conspirators would land a helicopter at the MCC, fly petitioner to a car containing a secret compartment in which he could be hidden, and drive petitioner to a safe house from which he could board a small private plane to fly to a farm he owned in Colombia. A fellow prisoner at the Williamson County Jail obtained the piloting services of Charles Clayton Stevens and provided petitioner's brother, Marc Kramer, with a letter of introduction to Stevens. Pet. App. A7-A8.

Stevens purchased three aircraft with $135,000 in cash provided by Marc Kramer: a helicopter, a twin-engine plane, and a second small plane he obtained after the original plane was damaged. Stevens took the helicopter and the small plane to Florida. Pet. App. A7; PSR 6-8. Marc Kramer also supplied Stevens with money for travel and expenses. PSR 6.

On April 17, 1989, after petitioner talked to Marc Kramer on the telephone, Marc Kramer telephoned Stevens to put the plan into action. Stevens landed the helicopter in a 47-foot wide exercise yard at the MCC. As the helicopter lifted off after petitioner boarded, its tail hit the wire at the top of a chain link fence surrounding the exercise yard. The helicopter catapulted over the fence, crashing in the prison grounds outside the exercise yard. Both petitioner and Stevens were seriously injured. Pet. App. A8 & n.5; PSR 9-10.[3]

[3] At the time of the attempted escape, one staff member and eight inmates were in the exercise yard. There were usually 15 to 20 inmates in the yard. Debris fell in the separate recreation yard for the segregation unit. Although one staff member and six inmates were in that yard, none of them was injured. PSR 9-10.

Following the escape attempt, the entire institution was closed and the inmates locked down for seven hours. PSR 10 ¶ 33. Approximately 100 federal, state, and local law enforcement and medical personnel were called to the crash site. 11/21/89 Sentencing Hearing Tr. 14. The recreation field was closed for two weeks. PSR 10 ¶ 33.

2. The presentence report calculated that petitioner's Sentencing Guidelines range was 37-46 months' imprisonment, based on an offense level of 15 and a criminal history category of V. PSR 17. The offense level was calculated as follows: the base offense level under the escape Guideline, see Guidelines § 2P1.1, was 13; there was a four-level increase under Guidelines § 3B1.1(a) for organizing or leading criminal activity that involved five or more participants; that enhanced level was then reduced by two levels for petitioner's acceptance of responsibility, see Guidelines § 3E1.1.

The presentence report listed four factors that might warrant a departure from the Sentencing Guidelines range. For each factor, the report recommended a departure in an amount determined by analogy to Guidelines for other offenses that included a pertinent factor that was not considered in the escape Guideline. See PSR 21 ¶ 82. First, the report recommended that the district court consider a two-point departure for "more than minimal planning," because "the conduct of the defendants in this case significantly differs from the norm," the escape Guideline does not include more than minimal planning as grounds for an upward adjustment of the offense level, and the Guidelines that do include that factor provide for adding two points to the offense level. PSR 21 ¶ 83.

Second, the presentence report recommended a departure of one point in the offense level because the offense caused between $101 and $1000 in property damage. The report based that recommendation on an analogy to the property loss table for theft offenses set forth in Guidelines § 2B1.1(b). PSR 21 ¶ 84.

Third, pursuant to Guidelines § 5K2.7 the presentence report recommended a departure of three points for disruption of a governmental function. The report reasoned that the attempted escape caused a major disruption to the Metropolitan Correctional Center and suggested that it would be appropriate to treat the disruption as seriously as a riot. PSR 21-22 ¶ 85. See Guidelines § 2P1.3(a)(2).

Finally, the presentence report recommended a departure equal to four points in the adjusted offense level under Guidelines § 5K2.14 for significantly endangering the public welfare based on the number of prisoners normally in the exercise yard, the number actually present, the injuries to petitioner and Stevens, the fact that gasoline dripping from the helicopter threatened to explode, and the fact that debris from the crash scattered widely where people were present. The report based that recommendation on an analogy to the four-level increase provided in the Guidelines for offenses against the person that result in serious bodily injury. PSR 22 ¶86.

At the April 13, 1990, sentencing hearing, the district court imposed sentence in accord with the recommendations of the presentence report. The court found that petitioner's Guidelines sentencing range was 37-46 months' imprisonment based on an adjusted offense level of 15 and criminal history category of V. The court then departed upward by analogy

to other Guidelines as suggested by the presentence report. The court sentenced petitioner to 125 months' imprisonment, the top of the Guidelines range applicable to an offender with an adjusted offense level of 25 and criminal history category of V.

3. The court of appeals affirmed. Pet. App. A1-A23. It found that the one-point departure for causing property damage was reasonable because the record clearly indicated that the escape attempt had caused at least $100 in damage. *Id.* at A15. The court upheld the two-point departure for more than minimal planning, because the conspirators had spent six months planning the escape, and because the plan involved the participation of five persons, the expenditure of hundreds of thousands of dollars, and the acquisition of specially equipped aircraft, a car, and a safe house. *Id.* at A15-A16. The court upheld the three-level departure for disruption of a governmental function because "[t]he actions necessary to respond to the crash of a helicopter inside the prison grounds with an escaping prisoner on board disrupted the operation of MCC far beyond the level of disruption contemplated by a run-of-the-mill escape attempt." *Id.* at A16-A17. The court also found appropriate the four-level departure for endangering the public welfare in light of the risk of serious bodily injury or death not only to petitioner and Stevens but also to the other inmates and prison officials in the exercise yard. *Id.* at A17. Lastly, the court held that the four-level increase in petitioner's base offense level for managing a criminal activity involving five or more participants was not clearly erroneous. *Id.* at A19-A20.

ARGUMENT

Petitioner claims that the district court improperly departed upward from the applicable Guidelines range.[4]

1. It should be noted at the outset that even if petitioner were successful in his claim, it is unlikely that the sentence he would serve would be affected. Petitioner was sentenced to life imprisonment without parole on the drug charges in Illinois. That conviction and sentence have been affirmed on appeal, and rehearing was denied on April 14, 1992. See *United States* v. *Kramer*, 955 F.2d 479 (7th Cir. 1992). Unless petitioner successfully petitions for certiorari in that case and ultimately succeeds in obtaining a reduced sentence, any decision in this case will not affect his total period of imprisonment.

2. Petitioner contends for the first time in this Court that the government should have been required to establish the grounds for a departure from the indicated Sentencing Guidelines range by clear and convincing evidence. Pet. 9-12. Petitioner did not

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[4] Petitioner's contention, *e.g.*, Pet. i, 8—that the sentence was five times the median offense level for a defendant who attempted to escape and has accepted responsibility for the offense—is misleading. The median offense level to which he refers is that of an offender whose base offense level was not adjusted upward based on factors that are present in this case. Here, petitioner's adjusted offense level was 15, not 11, because the district court increased his offense level by four levels under Guidelines § 3B1.1(a) based on his role in the offense; thus, petitioner's applicable Guidelines range was 37-46 months' imprisonment. The 24-month sentence that petitioner posits as the low end of the Guidelines range, Pet. 7, would not apply to him even if the district court did not depart from the Guidelines range. The sentence that petitioner received was approximately three times higher than petitioner's applicable Guidelines sentence, not five times higher as petitioner suggests.

raise that claim in the court of appeals. On appeal, he stated that the standard of proof for Guidelines departures was "at least a preponderance of the evidence." Pet. C.A. Br. 13, citing *United States* v. *Terzado-Madruga*, 897 F.2d 1099 (11th Cir. 1990). This Court does not ordinarily consider issues raised for the first time in this Court. See, *e.g.*, *United States* v. *Lovasco*, 431 U.S. 783, 788 n.7 (1977).

In any event, petitioner's claim does not warrant review by this Court. The courts of appeals have consistently held that factual findings under the Sentencing Guidelines need not be established by more than a preponderance of the evidence. See, *e.g.*, *United States* v. *Blanco*, 888 F.2d 907, 909 (1st Cir. 1989); *United States* v. *Guerra*, 888 F.2d 247, 250-251 (2d Cir. 1989), cert. denied, 494 U.S. 1090 (1990); *United States* v. *McDowell*, 888 F.2d 285, 290-291 (3d Cir. 1989); *United States* v. *Urrego-Linares*, 879 F.2d 1234, 1237-1238 (4th Cir.), cert. denied, 493 U.S. 943 (1989); *United States* v. *Carroll*, 893 F.2d 1502, 1506 (6th Cir. 1990); *United States* v. *White*, 888 F.2d 490, 499 (7th Cir. 1989); *United States* v. *Gooden*, 892 F.2d 725, 727-728 (8th Cir. 1989), cert. denied, 496 U.S. 908 (1990); *United States* v. *Restrepo*, 946 F.2d 654, 655-656 (9th Cir. 1991) (en banc), cert. denied, 112 S. Ct. 1564 (1992); *United States* v. *Frederick*, 897 F.2d 490, 491-493 (10th Cir.), cert. denied, 111 S. Ct. 171 (1990); *United States* v. *Alston*, 895 F.2d 1362, 1372-1373 (11th Cir. 1990); *United States* v. *Burke*, 888 F.2d 862, 869 (D.C. Cir. 1989).

Petitioner relies on *United States* v. *Kikumura*, 918 F.2d 1084, 1100-1102 (1990), appeal after remand, 947 F.2d 72 (3d Cir. 1991), in which the court of appeals required proof by clear and convincing evidence to support the district court's 22-level upward departure in the defendant's offense level under 18 U.S.C.

3553(b). The upward departure in that case resulted in an increase in the defendant's sentence from 30 months' imprisonment to 30 years' imprisonment. 918 F.2d at 1100. Although some courts have left open the question whether a higher standard of proof may be appropriate in such exceptional cases, see *United States* v. *Townley*, 929 F.2d 365, 370 (8th Cir. 1991); *United States* v. *St. Julian*, 922 F.2d 563, 569 n.1 (10th Cir. 1990), we are unaware of any court of appeals that has followed *Kikumura*. See *United States* v. *Sanchez*, No. 91-30250 (9th Cir. June 24, 1992), slip op. 7191 (*McMillan* v. *Pennsylvania*, 477 U.S. 79 (1986), provides "doubtful support" for the proposition that the factual basis for substantial increase in Guidelines sentence must be proved by more than preponderance of the evidence). In any case, as discussed below, there was ample evidence to support the departures in this case from the range indicated by the Sentencing Guidelines.

3. Petitioner argues that the imposition of consecutive sentences was inconsistent with the Sentencing Guidelines. Pet. 7-8. He claims that the sentence for multiple counts taken together should not ordinarily exceed the maximum sentence for a single count within the group. That suggestion lacks merit.

Part D of Chapter 3 of the Sentencing Guidelines provides that courts should group multiple counts into groups of "Closely-Related Counts," Sentencing Guidelines § 3D1.1(a)(1), so that the district court can select a single offense level for all closely related counts. Once that offense level has been chosen, however, those rules do not limit a court's discretion to depart upward to impose a sentence above the range indicated by the Guidelines for that offense level. *A fortiori*, those rules do not prohibit a court in an appropriate case from imposing consecutive sentences

in order to ensure that the total punishment is appropriate. See 18 U.S.C. 3584(a) (sentences may be concurrent or consecutive); Sentencing Guidelines § 5G1.2(d).

4. There is no merit to petitioner's factbound complaint, Pet. 12-22, that the departures for disruption of a government function and endangerment of public welfare are not supported by the record.[5]

Under Guidelines § 5K2.7, "[i]f the defendant's conduct resulted in a significant disruption of a governmental function, the court may increase the sentence above the authorized guideline range to reflect the nature and extent of the disruption and the importance of the governmental function affected." The attempted escape caused a major disruption of the institution. It required the presence of 100 federal, state, and local law enforcement and safety officials, a lockdown of the inmates for seven hours, and the closing of the exercise yard for two weeks. As the court of appeals found, the disruption of the institution was sufficiently in excess of the level of disruption that would normally be caused by an escape attempt that the district court reasonably analogized the seriousness of the offense to that caused by a riot that "involved a major disruption to the operation of an institution." See Guidelines § 2P1.3(a)(2).

United States v. *Riviere*, 924 F.2d 1289 (3d Cir. 1991), and *United States* v. *Singleton*, 917 F.2d 411 (9th Cir. 1990), on which petitioner relies, Pet. 15-17, do not assist him. In each case, the court determined that upward departures from the Guidelines range

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[5] Petitioner does not renew his challenges to the upward adjustment in his offense level for his role in the offense, or to the upward departures for property loss in excess of $100 and for more than minimal planning.

were not warranted, because the disruption of a governmental function caused by the defendant's escape did not exceed what would normally be caused by an escape or attempted escape. In *Riviere*, the defendant assaulted the officers transporting him to another location, so the officers had to reschedule the transportation. The court found that the attempted escape had simply caused the officers to perform one of their normal functions, the scheduling of prisoner transportation. 924 F.2d at 1308-1309. Similarly, in *Singleton* the police conducted two searches after the defendant escaped. The court found that the police were only performing their normal function of apprehending criminals. 917 F.2d at 414. The court explained that the case differed from one in which "a defendant's offense was so extensive that it caused more disruption than that inherent in the offense." *Ibid.* This is just such a case. Petitioner's escape attempt required action by far more law enforcement personnel than normal; it required the presence of firefighting and health and safety personnel not normally needed for an escape attempt; and it forced the closing of the exercise yard for an extended period. The district court therefore properly departed because of the significant disruption of a government function.

The district court also properly departed upward from the Guidelines range based on the significant danger to the safety of petitioner and others caused by the offense. See Guidelines § 5K2.14. In addition to the serious bodily injury to petitioner and Stevens, the offense endangered the safety of the staff member and the eight inmates who were in the exercise yard when the helicopter landed, and it endangered the

safety of the staff member and the six inmates who were in the nearby recreation yard in which some of the debris from the crash landed.

Petitioner identifies no decision to the contrary. In fact, each case he cites, like this one, upheld a departure based on the risk of serious injury or death to bystanders uninvolved in the criminal conduct. See *United States* v. *Kikumura*, *supra* (bomb for use in federal building); *United States* v. *Dempsey*, 957 F.2d 831, 833-834 (11th Cir. 1992) (homemade pipe bomb); *United States* v. *Loveday*, 922 F.2d 1411, 1415-1417 (9th Cir. 1991) (homemade pipe bomb); *United States* v. *Hummer*, 916 F.2d 186, 193-194 (4th Cir. 1990) (threatened mass poisoning of popular beverage), cert. denied, 111 S. Ct. 1608 (1991). See also *United States* v. *Rodriguez-Castro*, 908 F.2d 438, 441 (9th Cir. 1990) (causing a high-speed chase).

Petitioner further contends, Pet. 20-22, that the degree of the departure was unreasonable because the district court cumulatively added points for each factor justifying a departure, rather than specifically addressing the question whether the total departure was reasonable. That complaint is groundless. Where the Guidelines contemplate that the points attributable to particular factors should not be added together, the Guidelines expressly state that limitation. See, *e.g.*, Guidelines §§ 2B3.1(b)(3), 4A1.1(e). If the Guidelines provide for adjusting a base offense level for both threat of harm to persons and interference with a government function or a public institution, they add points to the base offense level for each factor. See, *e.g.*, Guidelines §§ 2F1.1, 2J1.2, 2J1.3. The district court's decision to use the same method of

adding points in departing from the Guidelines by analogy to other Guidelines was reasonable.[6]

Finally, contrary to petitioner's suggestion, the courts of appeals have upheld upward departures from the Guidelines that are several times the presumptive Guidelines sentence, if the size of the departure is warranted by factors present in the case. See, *e.g.*, *United States* v. *Lambert*, 963 F.2d 711 (5th Cir. 1992) (sentence for escape double that applicable under Guidelines); *United States* v. *Rodriguez-Cardona*, 924 F.2d 1148, 1154-1157 (1st Cir.) (upholding departure of three times the Guidelines sentence for drug offenders), cert. denied, 112 S. Ct. 54 (1991); *United States* v. *Benskin*, 926 F.2d 562 (6th Cir. 1991) (departure double Guidelines sentence); *United States* v. *Diaz-Villafane*, 874 F.2d 43, 50-52 (1st Cir.), cert. denied, 493 U.S. 862 (1989) (approving sentence four times higher than Guidelines range); *United States* v. *Roberson*, 872 F.2d 597, 606 n.7 (5th Cir.) ("[T]he mere fact that a departure sentence exceeds by several times the maximum recommended under the Guidelines is of no independent consequence in

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[6] *Kikumura*, on which petitioner relies, Pet. 20-22, is inapposite. There, the court found that the concerns behind Guidelines § 5K2.8, relating to especially heinous offenses, and Guidelines § 5K2.14, relating to endangerment, overlapped under the facts of the case and that the total departure for the two factors should not significantly exceed the adjustments to the offense level permitted by Chapter 3 of the Guidelines. 918 F.2d at 1118-1119. Here, the concerns reflected by the two relevant Guidelines are discrete. Guidelines § 5K2.7 relates to interrupting a governmental function, while Guidelines § 5K2.14 relates to endangering others. Furthermore, the district court in this case drew an analogy to factors set forth in the Guidelines to determine the amount of the departure; the district court in *Kikumura* did not.

determining whether the sentence is reasonable."), cert. denied, 493 U.S. 861 (1989).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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